Filed 1/17/19 P. v. Rhoades CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. RICHARD DANIEL RHOADES, Defendant and Appellant.	B285932 (Los Angeles County Super. Ct. No. KA113274)
In re RICHARD DANIEL RHOADES, On Habeas Corpus.	B293250

APPEAL from a judgment of the Superior Court of Los Angeles County. Bruce F. Marrs, Judge. Judgment affirmed in part and remanded in part.

PETITION for writ of habeas corpus denied.

Richard Daniel Rhoades, in pro. per.; Renee Paradis, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, and Nikhil Cooper, Deputy Attorney General, for Plaintiff and Respondent.

Richard Daniel Rhoades (appellant) was convicted of attempted robbery and assault. His sentence included a term imposed under Penal Code section 667, subdivision (a), which requires the court to impose a five-year enhancement for his prior conviction.[1] His court-appointed attorney filed a brief in accordance with the procedures outlined in *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). Appellant filed a supplemental brief. He also filed a petition for writ of habeas corpus. He contends the sentence imposed punished him twice for the same behavior in violation of the "Double Jeopardy" Clause of the United States Constitution, and that trial counsel was ineffective for admitting his guilt to the attempted robbery charge and for failing to interview and/or call additional witnesses. We conclude there was no double jeopardy or double punishment violation, and that appellant has failed to establish that his trial counsel was ineffective.

---

[1] Undesignated statutory references are to the Penal Code.

While the appeal was pending, the Governor signed Senate Bill No. 1393 which, effective January 1, 2019, amended sections 667, subdivision (a) and 1385, subdivision (b) to allow a sentencing court to exercise its discretion whether to strike or dismiss a prior serious felony. In light of the fact that the judgment in this case will not be final until after January 1, 2019, we requested supplemental briefing addressing whether the matter should be remanded for resentencing under Senate Bill No. 1393. After reviewing the supplemental briefs, we conclude remand is appropriate. Accordingly, we remand for resentencing and otherwise affirm the judgment. We deny the petition.

A. *Information*

Appellant was charged by information with attempted robbery (§ 213, subd. (b), count one) and assault by means of force likely to produce great bodily injury (GBI) (§245, subd. (a)(4), count two). It was further alleged that appellant personally inflicted GBI on the victim within the meaning of section 12022.7, subdivision (a), and that he had suffered a prior conviction of a serious or violent felony within the meaning of section 667, subdivision (a)(1) and the "Three Strikes" law (§§ 667, subd. (b)-(i) & 1170.12, subd. (a)-(d)).

B. *Evidence at Trial*

1. *Prosecution Evidence*

Richard Lopez, the victim, lived with his grandmother down the street from appellant. Appellant and Lopez were

acquaintances. Lopez was shorter and smaller than appellant, who was six feet tall and weighed 300 pounds. Appellant used a wheelchair, but was able to stand and walk for brief periods.

Lopez testified that on August 14, 2016, he was standing near his grandmother's home when he saw appellant's vehicle pull up. As Lopez walked toward the vehicle, appellant got out, not using a wheelchair or other assistance. Appellant asked Lopez about money he believed Lopez owed him for an incident several years earlier in which appellant's tires were slashed. Lopez said he had none. Appellant thrust his hands into Lopez's front pockets, which were empty. Lopez stepped back and pushed appellant's hands away. Appellant knocked Lopez down, got on top of him and punched him in the face. During the altercation, appellant also held Lopez's arms down and head-butted his face.

Frances Reeder, a neighbor who was passing by, saw appellant straddling Lopez and punching him. She did not see Lopez fighting back. Reeder yelled and appellant got up, allowing Lopez to retreat inside his grandmother's house.

After the attack, Lopez was bleeding from his nose and mouth. He later learned his nose had been broken. The prosecution presented photographs of Lopez's injuries. The photographs showed abrasions on Lopez's head, ear, neck and hand, a cut on his lip, and bruising on his nose and forehead. Lopez, who denied throwing any punches, had no cuts or bruises on his knuckles.

After the incident, appellant called deputies and made the following report. Lopez flagged down appellant's vehicle by jumping in front of it as it was passing by. Appellant recognized Lopez as the person who had vandalized his vehicle sometime earlier. Appellant got out of his vehicle and asked Lopez for money. Lopez denied having any, so appellant grabbed or touched Lopez's pockets to check. Lopez pushed appellant down, but appellant managed to land on top of him. Appellant admitted hitting Lopez, but told the deputies he acted in self-defense. After interviewing Lopez and observing his injuries, the deputies arrested appellant.

2. *Defense Evidence*

Testifying on his own behalf, appellant stated he was disabled by rheumatic fever and the loss of fluid in his joints. He denied being able to curl his hands into a fist. He said that on August 14, he had seen Lopez in front of his grandmother's house and decided to tell Lopez's grandmother about the tire slashing incident.[2] As he was walking to the door, Lopez got in front of him and pushed him back. Appellant said they both fell and their heads smacked together. They rolled and appellant ended up on top. Lopez flailed at him and appellant swung back, making

---

[2] The defense also called appellant's fiancée, Irene Jamie, and his friend, Stacy Queen. Both testified that they had heard Lopez agree to pay restitution for appellant's tires.

contact at least once. Appellant denied touching or putting his hands inside Lopez's pockets.

C. *Argument and Procedural Matters*

Prior to trial, the prosecutor asked the court to exclude evidence of appellant's current medical condition, including the fact he was then receiving chemotherapy treatment. Defense counsel did not object, and the court granted the motion.

In his opening statement, defense counsel stated that appellant "patted [Lopez's] pockets to see if he had anything" when he first confronted Lopez, after Lopez denied having any money, but "[d]idn't put his hands in [Lopez's] pockets."

In closing, the prosecutor argued that the evidence established that appellant "shoved" his hands into Lopez's pockets and "fished around" for money or valuables, and that when Lopez pushed appellant's hands away, appellant grabbed Lopez and pulled him down. With respect to the assault charge, the prosecutor stated: "Even if you were . . . to believe that Mr. Lopez came at the defendant first and he engaged him in this fight and he attacked him, even though he wasn't there looking for a fight[,]. . . even if you think there may be a viable self-defense argument [the jury instructions] tell[] you even if valid at some point it's only valid up until the apparent threatened danger continues to exist. [¶] The moment someone's down on the ground, flat out, hands to their side, disabled, unable to fight back, self-defense ends completely. [¶] So even if you were to entertain

that argument, you know it doesn't apply here. Because when his arms were disabled and down by his sides, limp almost, to the point where they were recoiling, he was struck two to three times." She further stated that the evidence established that "the defendant dragged the victim down to the ground, onto his back, mounted him . . . you're talking about a 300-pound man sitting on the chest of a 140-pound person. And with the weight of his body on top of him, he's throwing punches at him. And gravity's obviously working to the defendant's advantage. And that's when the victim was struck with a flurry of punches." The prosecutor reminded the jury of Reeder's testimony, stating "she saw the defendant mounted on top of the victim and throw two to three hard punches."

Concerning motive, the prosecutor stated: "This was not a random act of violence. You've heard testimony that there was obviously a reason why this happened. It sounds like it's been brewing for a while now. I think it was about two to three years. [¶] Two to three years this defendant has been upset, angry, felt [slighted] felt wronged. Many times he approached and confronted the victim. But never did he get paid. He was pissed. There was no doubt about that." She later stated: "You cannot use sympathy in this case. You may think, [']you know what, it's not fair that he thinks his property was damaged and he should be entitled to money.['] We're not disagreeing with that. If he was wronged in some way and he had a legal right to the money that he deserved, there are ways of obtaining that. [¶] You

can't go to someone's house and you can't beat them up, you can't attack them. You can't break their nose and take matters into your own hands, no matter how upset it makes you."

D. *Verdict and Sentencing*

The jury found appellant guilty of both counts, and found the actual infliction of GBI allegation true. The court found true the prior conviction allegation, and denied a motion to strike a strike made pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. The court sentenced appellant to twelve years imprisonment, representing the low term of two years for count two, doubled pursuant to section 1170.12, subdivisions (a) through (d) and 667, subdivisions (b) through (i), plus five years for the prior pursuant to section 667, subdivision (a)(1), and three years for the GBI enhancement pursuant to section 122022.7, subdivision (a). The sentence on count one was stayed pursuant to section 654. Appellant filed a timely notice of appeal. Appellate counsel filed a *Wende* brief. Appellant filed a supplemental brief. Appellant also filed a petition for habeas corpus, which we consider along with his supplemental brief.

DISCUSSION

A. *Double Jeopardy/Multiple Punishment*

The supplemental brief contends that because appellant was convicted of assault by means of force likely to

inflict GBI, a GBI enhancement for the same offense was found true, and the court imposed sentences for both the assault and the enhancement, he was placed in "double jeopardy." The double jeopardy clause provides that "[n]o person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb . . . ." (U.S. Const. 5th amend., pt. 1.) It "'"protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. . . ." [Citation.]'" (*People v. Sloan* (2007) 42 Cal.4th 110, 121, italics omitted, quoting *Brown v. Ohio* (1977) 432 U.S. 161, 165.) It also protects against multiple punishments for the same criminal offense, but "'only when such occurs in successive proceedings . . . .'" (*People v. Sloan*, *supra*, at p. 121, italics omitted, quoting *Hudson v. U.S.* (1997) 522 U.S. 93, 99.) As this appeal is from a single proceeding, the double jeopardy clause is not implicated. (See *People v. Izaguirre* (2007) 42 Cal.4th 126, 134 ["The rule . . . barring consideration of enhancements in defining necessarily included charged offenses under the multiple conviction rule does not implicate the double jeopardy clause's protection against a second prosecution for the same offense after acquittal or conviction. We are not here concerned with a retrial or 'second prosecution,' but instead with a unitary trial in which [California law] expressly permits conviction of more than one crime arising out of the same act or course of conduct."].)

California law prohibits multiple punishments for the same offense. (See § 654 ["An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."].) In addition, although section 12022.7 provides for imposition of an additional three-year term of imprisonment where the defendant "personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony," it specifically precludes imposition of that additional term if "infliction of great bodily injury is an element of the offense [of which the defendant is convicted]." (§ 12022.7, subds. (a) & (g).)

Here, there was no violation of section 654's prohibition against multiple punishments for the same offense or of section 12022.7's prohibition against imposing the enhancement when GBI is an element of the underlying offense. Under section 245, infliction of GBI is not an element of the crime of assault by means of force likely to inflict GBI, which may be committed "without making actual physical contact with the person of the victim . . . ." (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028.) As our Supreme Court has explained, "because the statute focuses on *use* of a deadly weapon or instrument or, alternatively, on force *likely* to produce great bodily injury, whether the victim in fact suffers any harm is immaterial." (*Ibid.*; accord, *People v. Corning* (1983) 146 Cal.App.3d 83, 90 ["Aggravated assault

is an attempt offense [citations], and thus may be committed without the actual use of force . . . ."].) Establishing the section 12022.7 enhancement, on the other hand, requires proof of actual contact causing physical harm that amounts to great bodily injury. (*People v. Woods* (2015) 241 Cal.App.4th 461, 486.) Because the enhancement applies only to increase the punishment where the assault is committed in a certain way -- by actually inflicting great bodily injury -- it does not impose double punishment. (See *People v. Ahmed* (2011) 53 Cal.4th 156, 163 ["[E]nhancement provisions do not define criminal acts; rather, they increase the punishment for those acts. They focus on aspects of the criminal act that are not always present and that warrant additional punishment."], italics omitted.)

B. *Effectiveness of Counsel*

In his supplemental brief and habeas corpus petition, appellant contends his trial counsel was ineffective because he allegedly admitted appellant's guilt to the attempted robbery charge in his opening statement, failed to call additional witnesses with knowledge of Lopez's vandalism and appellant's medical condition, and failed to interview neighbors who purportedly saw the altercation and could have supported appellant's version of events. For the reasons discussed, we conclude appellant has failed to establish ineffective assistance of counsel.

1. *Burden on Defendant and Standard of Review*

"A criminal defendant's federal and state constitutional rights to counsel (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15) include the right to effective legal assistance." (*People v. Mai* (2013) 57 Cal.4th 986, 1009, italics omitted.) "When challenging a conviction on grounds of ineffective assistance, the defendant must demonstrate counsel's inadequacy. To satisfy this burden, the defendant must first show counsel's performance was deficient, in that it fell below an objective standard of reasonableness under prevailing professional norms. Second, the defendant must show resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different." (*Ibid.*) "[A] defendant claiming ineffective representation 'must show . . . that counsel's deficient performance . . . "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." [Citations.]'" (*People v. Mendoza* (2000) 24 Cal.4th 130, 158.)

In assessing claims of ineffective assistance of counsel, an appellate court "'indulge[s] in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy.'" (*People v. Gamache* (2010) 48 Cal.4th 347, 391.) "'Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel.'" (*Ibid.*) "'If the record on appeal sheds no light on why counsel acted

or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation.'" (*Ibid.*)

2. *Counsel's Statement to the Jury*

Generally, defense counsel may not withdraw a defense and argue to the jury that the defendant is guilty without the defendant's consent (*People v. Diggs* (1986) 177 Cal.App.3d 958, 970), and "a defense attorney's concession of his client's guilt, lacking any reasonable tactical reason to do so, can constitute ineffectiveness of counsel. [Citations.]" (*People v. Gurule* (2002) 28 Cal.4th 557, 611.) A defense attorney cannot be faulted, however, for adopting a "'realistic approach'" based on the evidence that has been or will be presented, or for concluding that candor would be an effective strategy in the face of that evidence. (*Id.* at p. 612; see *People v. Mayfield* (1993) 5 Cal.4th 142, 177 ["[C]andor may be the most effective tool available to counsel"].)

Preliminarily we observe that appellant's counsel did not admit appellant's guilt to the attempted robbery charge. In his opening statement, counsel told the jury that the evidence would show appellant "patted [Lopez's] pockets to see if he had anything," but emphasized that appellant "[d]idn't put his hands in [Lopez's] pockets." Robbery is defined as the "'taking of personal property in the possession of another, from his person or immediate presence, and

against his will, accomplished by mean of force or fear.'" (*People v. Morales* (1975) 49 Cal.App.3d 134, 139.) With respect to the use of force, it requires more than a mere touching; it requires application of a quantum of physical force against the victim that amounts to "more force than necessary to accomplish the taking of [the property]," force that is sufficient to "overcome the victim's resistance." (*People v. Mungia* (1991) 234 Cal.App.3d 1703, 1708.) Appellant's counsel's statement that appellant had touched the victim's pockets did not suggest that appellant applied any force or that that the victim resisted. Thus, counsel did not concede appellant's guilt.

Moreover, counsel had a clear strategic reason for informing the jury that the evidence would show that appellant touched Lopez. According to the report of the deputy who testified at trial, appellant told the deputies who arrived in response to his call that he "grabbed" or "touched" Lopez's pockets before the physical altercation began. Counsel's decision to lessen the impact of this testimony before it emerged at trial was not unreasonable.

3. *Failure to Investigate and/or Call Additional Witnesses*

Appellant contends in his supplemental brief and his petition for habeas corpus that his counsel provided ineffective assistance by failing to call additional witnesses to attest to Lopez's vandalism and appellant's medical condition, and failed to interview neighbors who allegedly

saw the altercation and could have supported his version of events. Because the record on appeal cannot establish whether such witnesses existed or were interviewed by counsel, the claim must be considered in the context of the habeas corpus petition. (See *People v. Williams* (1988) 44 Cal.3d 883, 917, 933 ["As evidence of incompetency of counsel, the failure of the record to reflect . . . indicia of investigative effort has no . . . probative value . . . . It establishes neither an actual failure to investigate nor a basis for concluding that evidence supportive of the [defense at issue] was available and was not offered as a result of counsel's failure to discover it. A factual basis, not speculation, must be established before reversal of a judgment may be had on grounds of ineffective assistance of counsel."].)

"Because a petition for a writ of habeas corpus seeks to collaterally attack a presumptively final criminal judgment, the petitioner bears a heavy burden initially to plead sufficient grounds for relief . . . ' . . . [A]ll presumptions favor the truth, accuracy, and fairness of the conviction and sentence; defendant thus must undertake the burden of overturning them. Society's interest in the finality of criminal proceedings so demands, and due process is not thereby offended.'" (*People v. Duvall* (1995) 9 Cal.4th 464, 474, italics omitted.) To satisfy this initial burden, the habeas corpus petition must "state fully and with particularity the facts on which relief is sought" and should "include copies of reasonably available documentary

evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations. [Citations.]" (*Id.* at p. 474.) "'Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief . . . .'" (*Ibid.*)

Where the contention is that counsel failed to investigate and/or failed to call witnesses, "[t]he petitioner must demonstrate that counsel knew or should have known that further investigation was necessary, and must establish the nature and relevance of the evidence that counsel failed to present or discover." (*People v. Williams, supra,* 44 Cal.3d at p. 937.) "[T]he petitioner must not only prove that counsel inexcusably failed to make particular investigations . . . , or failed to introduce particular items of evidence, but must also demonstrate that the omissions resulted in the denial of or inadequate presentation of a potentially meritorious defense." (*Id.* at p. 936.)

With respect to additional witnesses or testimony concerning the vandalism, the habeas corpus petition provides a statement from a witness who claimed to have seen the vehicle in which the perpetrators of the tire slashing were riding. She did not claim to have seen the perpetrators or to know who owned the vehicle. Moreover, her testimony would have been redundant. Several witnesses, as well as defendant, testified that Lopez accepted responsibility and agreed to reimburse appellant. Establishing more definitively that Lopez was the person responsible for slashing appellant's tires would not have

aided the defense. To the contrary, as the prosecutor's closing argument demonstrated, the incident provided an explanation for appellant's anger and a motive for his attack on Lopez.

With respect to evidence of appellant's medical condition, appellant identified no particular witnesses and provided no description of what any such witnesses might have said. Thus, he failed to meet his burden of stating the facts with particularity. In any event, it was clear to the jury that appellant was disabled, as he was in a wheelchair at the time of trial. The prosecutor did not dispute that appellant had difficulty standing and walking, but stressed that the injuries to Lopez occurred, and the elements of the crime of assault were satisfied, when both were on the ground. Accordingly, appellant has failed to establish that additional medical evidence would have assisted his defense.

Concerning the neighbors who purportedly saw the altercation, appellant states in his declaration that they "came to [his] house proclaiming what they had seen and promising to come forward to state what they observed on 8/14/16." He further states that their testimony would have "verif[ied] Lopez being the initiator of physical contact, and especially that [appellant] never attempted to place his hands in Mr. Lopez's pockets . . . ." As appellant neither identifies these neighbors, nor provides statements from them, his factual showing is inadequate.

C. *Senate Bill No. 1393*

Under the versions of section 667, subdivision (a) and section 1385, subdivision (b) in effect when appellant was sentenced, the court was required to impose a five-year consecutive term for "any person convicted of a serious felony who previously has been convicted of a serious felony" (§ 667, subd. (a)), and the court had no discretion "to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." (§ 1385, subd. (b).) On September 30, 2018, while this appeal was pending, the Governor signed Senate Bill No. 1393, amending section 667, subdivision (a) and section 1385, subdivision (b) to allow a court to exercise its discretion whether to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2; *People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*).) In *Garcia*, the court held that Senate Bill No. 1393 applies to all cases not final when it becomes effective on January 1, 2019. (*Garcia*, *supra*, at p. 971.)

As this appeal was not scheduled to become final before January 1, 2019, we requested supplemental briefing on whether to remand to allow the trial court to exercise its discretion under Senate Bill No. 1393. The parties agreed the new law would apply retroactively to appellant when it became effective, but respondent claimed the matter was unripe for judicial action until that date. As it is now past January 1, 2019, it is appropriate to remand the matter to the trial court to permit it to exercise its discretion whether

to strike the prior serious felony. (*Garcia*, *supra*, 28 Cal.App.5th at pp. 972-973.)

///

///

///

DISPOSITION

The matter is remanded to the trial court with direction to resentence appellant pursuant to section 667, subdivision (a) and 1385, subdivision (b), as amended by Senate Bill No. 1393 effective January 1, 2019. In all other respects, the judgment is affirmed. The petition is denied.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, P. J.

We concur:

WILLHITE, J.

DUNNING, J.*

*Judge of the Orange County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.